

Congressional Provision for Nonjury Trial under the Seventh Amendment

For almost two centuries the Seventh Amendment¹ has been interpreted to preserve the right to a civil jury trial as it existed at common law in England in 1791,² the year the Amendment was adopted. Over the past fifteen years, however, the Supreme Court has presided over a broad expansion of the right to civil jury trial.³ Where Congress has sought to limit the scope of jury trial by statute, the Court's expansive reading of the Seventh Amendment appears to clash with the legislative will. One such conflict is in the area of civil rights. Because juries hearing such suits may be biased against the plaintiff's claims,⁴ and because the delay⁵ and cost of jury trial may inhibit prosecution of such actions, Congress indicated that some civil rights actions should be tried to the court alone.⁶ Courts, for their part, have generally ruled against the demand for a jury trial⁷ in these actions

1. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ." U.S. CONST. amend. VII.

2. See *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377-78 (1913). See generally F. JAMES, *CIVIL PROCEDURE* 337 (1965); 5 MOORE'S FEDERAL PRACTICE ¶ 38.08[5], at 79 (2d ed. 1971).

3. The key cases have been *Ross v. Bernhard*, 396 U.S. 531 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

For explanations of the nature of the expansion, see 5 MOORE'S FEDERAL PRACTICE AND PROCEDURE § 2302, at 21-22 (1971) [hereinafter cited as WRIGHT & MILLER]; James, *Right to Jury Trial in a Civil Action*, 72 YALE L.J. 655, 687 (1963).

4. Goldfarb & Kurzman, *Civil Rights and Civil Liberties: The Jury Trial Issue*, 12 U.C.L.A. L. REV. 486, 487 (1965); Comment, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. CHI. L. REV. 167 (1969); Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019, 1051 (1969).

5. See Zeisel, *The Jury and Court Delay*, 328 ANNALS 46, 47 (1960); Note, *Ross v. Bernhard: The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112, 123-26 (1971).

6. See p. 417 *infra*.

7. Many courts have held the jury trial right not to exist in actions under 42 U.S.C. §§ 2000e *et seq.* (1970), as amended 42 U.S.C. §§ 2000e *et seq.* (Supp. II 1972) (Title VII of the 1964 Civil Rights Act). See, e.g., *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1972); *Johnson v. Georgia Highway Exp., Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Lowry v. Whitaker Cable Corp.*, 348 F. Supp. 202, 209 n.3 (W.D. Mo. 1972); *United States v. Ambac Industries*, 15 FED. RULES SERV. 2d 607 (D. Mass. 1971); *Gillen v. Federal Paper Board Co.*, 52 F.R.D. 383, 386 (D. Conn. 1970). But cf. *King v. Local 818, Laborers*, 443 F.2d 273, 275 (6th Cir. 1971) (trial court granted motion for jury trial in Title VII action).

Courts have also held there is no jury trial right in employment discrimination actions for reinstatement and lost wages brought under 42 U.S.C. § 1983 (1970) (the Civil Rights Act of 1871). See, e.g., *McFerren v. County Bd. of Educ.*, 455 F.2d 199, 202, 204 (6th Cir.), *cert. denied*, 407 U.S. 934 (1972); *Harkless v. Sweeny Independent School Dist.*, 427 F.2d 319, 323-24 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *Smith v. Hampton Training School for Nurses*, 360 F.2d 577, 581 (4th Cir. 1966).

One district court has gone so far as to hold that all suits under § 1983 are equitable. *Lawton v. Nightingale*, 345 F. Supp. 683 (N.D. Ohio 1972); *Jones v. Witten-*

despite the fact that the Supreme Court's modern Seventh Amendment doctrine seems to mandate the opposite result. None of the rationalia used by these courts in their holdings is particularly compelling.⁸

This Note argues that the Supreme Court's recent cases on the Seventh Amendment⁹ construe that provision not to preserve a purely historical categorization of actions as legal or equitable. Instead, the Court's theory of the Seventh Amendment rests on the principle that an action can be equitable in nature if law is inadequate and that the indication of this inadequacy is a rational congressional mandate that the suit be tried to the judge alone. This interpretation of recent Seventh Amendment cases furnishes the Court, which is presently considering the issue,¹⁰ with a broad and logical argument for holding many statutory civil rights actions not to be triable to a jury.¹¹ In addition, it could provide a basis in the future for limitation of the right to jury trial by Congress should it determine that considerations of justice and efficiency so require.

I

In Title VII of the 1964 Civil Rights Act¹² Congress created an action for employment discrimination, triable only to a judge rather

berg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd on other grounds sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). This holding is more remarkable for its boldness than its authority.

See also note 10 *infra*.

8. See note 49 *infra*.

9. See note 3 *supra* & part II *infra*.

10. Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972), *cert. granted*, 93 S. Ct. 2770 (1973). This was a Title VIII (42 U.S.C. § 3612 (1970)) housing discrimination action in which plaintiffs sought money damages. The district court rejected defendant's demand that a jury be empaneled to hear the claim, but the court of appeals reversed and held there was a right to jury trial. The same result was reached in Kelly v. Armbrust, 351 F. Supp. 869 (D.N.D. 1972); Kastner v. Brackett, 326 F. Supp. 1151 (D. Nev. 1971). *Contra*, Cauley v. Smith, 347 F. Supp. 114 (E.D. Va. 1972). The latter was a suit under 42 U.S.C. § 3612(c) (1970) for money damages as well as injunctive and declaratory relief based on defendant's allegedly racially motivated refusal to rent an apartment. The court concluded that no right to jury trial attached under § 3612(c). It found the legislative history unhelpful in discovering the nature of the relief provided by the statute, but characterized the money relief as restitutive and therefore equitable. *Id.* at 115. Although the statute also provides for the award of punitive damages, 42 U.S.C. § 3612(c) (1970), the court concluded that the limitation placed on the amount of such damages maintained the statute's equitable character despite the apparently legal nature of punitive damages. See Note, *Monetary Claims Under Section 1983: The Right to Trial by Jury*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 613 (1973). The Seventh Circuit has taken an opposite view with regard to the restitutive character of the remedies under Title VIII. Rogers v. Loether, 467 F.2d 1110, 1122 (7th Cir. 1972), *cert. granted*, 93 S. Ct. 2770 (1973).

11. This Note does not discuss whether jury trial ought to be provided in civil rights cases. The argument is only that Congress has the constitutional authority to decide the question.

12. 42 U.S.C. §§ 2000e *et seq.* (1970), as amended 42 U.S.C. §§ 2000e *et seq.* (Supp. II 1972) [hereinafter cited as Title VII].

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than to a jury.¹³ Courts have recognized this intent and have held that Title VII actions for reinstatement and “back pay” (wages the employee would have earned had the employer not violated the substantive provisions of the law) do not import the right to jury trial.¹⁴ Several circuits, moreover, have held that virtually identical¹⁵ actions brought under § 1983 of title 42 of the United States Code¹⁶ may be tried only to a judge.¹⁷

Courts have denied the “right” to a jury trial in several other statutory schemes, *e.g.*, in actions for unpaid overtime and minimum wages under the Fair Labor Standards Act,¹⁸ for restoration to union membership and damages resulting from suspension under the Labor-Management Reporting and Disclosure Act,¹⁹ for damages in actions alleging housing discrimination brought under Title VIII of the Civil Rights Act of 1968²⁰ and for legal and equitable relief under the 1967 Age Discrimination in Employment Act.²¹ Cases concerning

13. See p. 417 *infra*.

14. See note 7 *supra*. See generally Comment, *supra* note 4.

15. On the similarity between employment discrimination actions brought under Title VII and those brought under 42 U.S.C. § 1983 (1970), see p. 422 *infra*.

16. 42 U.S.C. § 1983 (1970).

17. See cases cited note 7 *supra*.

18. Under § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970) [hereinafter cited as FLSA], employees may sue their employers for unpaid minimum wages or unpaid overtime compensation. Under 29 U.S.C. § 216(c) (1970) the Secretary of Labor is authorized to bring the same action in behalf of employees. Under 29 U.S.C. § 217 (1970) district courts are given jurisdiction to restrain withholding of payments of minimum wages or overtime compensation in suits brought on behalf of the employee by the Secretary of Labor. The right to jury trial exists as to suits brought under § 216(b) and § 216(c), see *Wirtz v. Jones*, 340 F.2d 901, 904 (5th Cir. 1965), but there is no jury trial right in actions under § 217. *Id.* For an attempt to rationalize this result, see Note, *Fair Labor Standards Act and Trial by Jury*, 65 COLUM. L. REV. 514 (1965).

19. 29 U.S.C. § 412 (1970). Employees may sue for reinstatement and lost wages upon a suspension resulting from the exercise of rights guaranteed in 29 U.S.C. § 411 (1970), the Bill of Rights of members of labor organizations. *Simmons v. Local 713, Textile Workers*, 350 F.2d 1012 (4th Cir. 1965), held the jury trial right exists as to claims asserted under 29 U.S.C. § 412 (1970). *Contra*, *McCraw v. Local 43, Plumbers & Pipefitters*, 341 F.2d 705 (6th Cir. 1965).

20. 42 U.S.C. §§ 3601 *et seq.* (1970). Lower courts are split on the jury trial right question. See note 10 *supra*.

21. 29 U.S.C. §§ 626(b), (c) (1970). The question of a right to jury trial under this statute has apparently not been litigated. In *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231 (N.D. Ga. 1971), there was a jury trial; in *Stringfellow v. Monsanto Co.*, 320 F. Supp. 1175 (W.D. Ark. 1970), there was not. The issue of a right to jury trial was not discussed in either case.

Section 626(b), however, decrees that the statute shall be enforced “in accordance with the powers, remedies, and procedures” of §§ 216 & 217. See note 18 *supra*. Thus an age discrimination action analogous to a FLSA action under § 216 or § 217 might import the same right to jury trial as do actions under those statutes. Section 626(c), however, provides that an aggrieved party “may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter” Should an employee claiming age discrimination bring a § 626(c) action not analogous to §§ 216 & 217 actions, for instance an action for damages based on emotional injury, courts can only apply the traditional historical analogies to discover the existence *vel non* of the jury trial right. Congress has not assisted courts by expressing its intent on the question.

the right to jury trial in actions under these and several now defunct statutes²² constitute a body of doctrine available to courts seeking to effectuate congressional intentions for nonjury trial in statutory actions. These cases, however, have for the most part not dealt with the implications of recent expansive Supreme Court holdings on the Seventh Amendment.

The Court has recently held²³ that the right to jury trial of a legal claim cannot be lost because that claim was introduced in a suit after equitable claims were made or because that claim was of small magnitude in comparison with an equitable claim raised in the same suit. Thus the claim for back pay damages incurred by discriminatory breach of an employment contract would appear to be legal in nature and thus triable by right to a jury,²⁴ regardless of the nature of any other relief sought by the plaintiff.

Generally, however, three arguments have been developed to limit the right to jury trial in statutory actions. None is entirely compelling. None applies with equal force to all statutory actions. And none provides the Supreme Court with a justification for ruling, as it is presently being asked to do in *Rogers v. Loether*,²⁵ against a right to jury trial in Title VIII housing discrimination actions.

22. E.g., The Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885. *Strelitz v. Surrey Classics, Inc.*, 7 F.R.D. 101 (S.D.N.Y. 1946), held there was no right to jury trial in actions for reinstatement and back pay under the Act, but *Steffen v. Farmers Elevator Serv. Co.*, 109 F. Supp. 16 (N.D. Iowa 1952), distinguished *Strelitz* and granted jury trial where monetary damages rather than reinstatement were sought.

Another such statute was the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, authorizing the recovery of rent and price overcharges. See § 205(a) (government may seek injunction restraining violations); § 205(e) (individual may sue for \$50 or triple the overcharge; as amended by the Stabilization Extension Act of 1944, 58 Stat. 632, 640-41, the government may undertake this action in behalf of the individual). In *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), the government suit for restitution of rent overcharges to tenants and an injunction restraining further overcharges was held an equitable action authorized by § 205(a). A private action under § 205(e), however, was acknowledged to be cognizable at law. 328 U.S. at 402.

23. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500 (1959); part II *infra*.

24. If the action for lost wages ("back pay") is characterized as akin to "special assumpsit" to recover damages on a simple contract, then the issues raised therein are triable to a jury on demand. 5 MOORE'S FEDERAL PRACTICE ¶ 38.11[5], at 120 (2d ed. 1971). See also *Ochoa v. American Oil Co.*, 338 F. Supp. 914 (S.D. Tex. 1972) (the same district court that was reversed in *Harkless v. Sweeny Independent School Dist.*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971), expatiates on the legal nature of claims for back pay presented under Title VII; the court holds contrary to its reasoning, because *Johnson v. Georgia Highway Exp., Inc.*, 417 F.2d 1122 (5th Cir. 1969) is controlling); 9 WRIGHT & MILLER, *supra* note 3, § 2308, at 46 n.53.

In *United States v. Georgia Power Co.*, 427 F.2d 906 (5th Cir. 1973), the court argued that civil rights employment discrimination actions should not be considered analogous to breach of contract suits. The alternative, however, is to consider them analogous to tort claims. *United States ex rel. Jones v. Rundle*, 453 F.2d 147 (3rd Cir. 1971); *Shapo, Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 N.W.U. L. REV. 277 (1965). A tort claim would have been brought in a trespass action in 1791 in a court of law; thus the right to jury trial exists. 5 MOORE'S FEDERAL PRACTICE ¶ 38.11[5], at 118 (2d ed. 1971).

25. 467 F.2d 1110 (7th Cir. 1972), *cert. granted*, 93 S. Ct. 2770 (1973).

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The first argument postulates that since the statutorily created rights are "public" and not "private," they are equitable rather than legal.²⁶ A public right is said to be one in which the people at large are interested. Such a right, it is said, is unlike the purely private rights asserted by individuals in actions at law; therefore it is equitable.²⁷

This argument, however, cannot be harmonized with the existence of the jury trial right in causes of action in which the public at large is vitally interested.²⁸ The public right argument also misconstrues the meaning of the term "right" as used by the Court in its interpretations of the Seventh Amendment.²⁹ Equitable rights have no special character other than that they are rights which could not be asserted at law due to some inadequacy of that forum. Equitable rights are no more imbued with the public interest than are other rights recognized by the state and enforced in its courts.³⁰

A variation of the argument is that the Seventh Amendment does not apply to causes of action created by statute: Where the legislature does not merely codify but creates the action, it could not have existed at common law in 1791. Since the Seventh Amendment only preserves the right to jury trial as it then existed, the argument goes, there is

26. See, e.g., *Wirtz v. Jones*, 340 F.2d 901, 903-04 (5th Cir. 1965); *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232, 1239-43 (N.D. Ga. 1969), *rev'd on statute of limitations question*, 421 F.2d 888 (5th Cir. 1970); cf. *McCraw v. Local 43, Plumbers & Pipefitters*, 341 F.2d 705, 709 (6th Cir. 1965).

27. But see 3 W. BLACKSTONE, COMMENTARIES *2 where "public wrongs" are said to be a breach of "public rights" and "private wrongs" are an "infringement" of "private or civil rights belonging to individuals, considered as individuals." Blackstone, however, then notes that public wrongs are "distinguished by the harsher appellations of *crimes and misdemeanors*" (emphasis in original). A possible implication is that he believes there is no such thing as a public right which can be asserted in a civil court.

28. For example, in *Hepner v. United States*, 213 U.S. 103 (1909), a suit to collect a statutory penalty was said to be equivalent to a suit to collect a debt and therefore triable to a jury, although the right is asserted in the public interest. In *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27 (1916), it was established that there was a constitutional right to jury trial in antitrust actions for treble damages under the Sherman Act, though the public interest was obviously involved.

29. On the importance of the distinction between the right asserted and the form of action in which it is asserted, see *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) (Story, J.) (emphasis in original):

By common law, they [the writers of the Seventh Amendment] meant what the constitution denominated in the third article "law;" not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered

30. "A true equitable right is always derivative and dependent, i.e., it is derived from, and dependent upon, a legal right." C. LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION 5 (1905). If Langdell is correct, then equitable rights are not of a different nature than legal rights. They are simply legal rights which remedial and procedural inadequacies in the courts of law have stultified; these legal rights, unchanged in nature, are cognizable in equity for want of a legal forum. They are thereafter labeled equitable rights. The distinction between legal and equitable rights, therefore, describes only the forum in which these rights may adequately be asserted. See p. 411 *infra*.

no right to a jury trial of issues raised in a modern statutory action.³¹ *N.L.R.B. v. Jones & Laughlin Steel Corp.*³² is cited to support this argument, but the Court held in that case only that the Seventh Amendment did not apply to guarantee a jury trial right in "statutory proceedings," which are distinguishable from statutory actions.³³ The clear weight of authority indicates that if Congress creates an action without indicating that it be considered equitable, then rights raised in that action may properly be held triable to a jury if analogous to rights asserted at law in 1791 in England.³⁴

In the employment discrimination actions, claims for monetary relief are often joined with a request for an injunction compelling reinstatement in the job from which plaintiff was wrongfully discharged or in which plaintiff would have been placed had the employer not discriminated.³⁵ A second argument against jury trial of the putatively legal claim for "back pay" rests on its incidental³⁶ nature to the equitable injunctive relief sought. This "equitable

31. See, e.g., *McCraw v. Local 43, Plumbers & Pipefitters*, 341 F.2d 705, 709 (6th Cir. 1965).

32. 301 U.S. 1 (1937). In this case, which arose upon a petition by the NLRB for judicial enforcement of one of its orders, respondent launched a broad-based attack on the constitutionality of the National Labor Relations Act. It based its arguments in part upon the statute's provision empowering the Board to award back pay after a wrongful discharge in a proceeding without a jury trial.

33. Though the Court does not carefully distinguish "statutory proceedings" from causes of action created by statute, the notion of statutory proceedings to which the Seventh Amendment does not apply is a narrow one. The Court cited only *Guthrie National Bank v. Guthrie*, 173 U.S. 528 (1899), which held that the Seventh Amendment did not apply to a statute creating a special tribunal to hear and decide upon claims, not founded in a legal obligation, against a municipal corporation. See also *Rogers v. Loether*, 467 F.2d 1110, 1115 (7th Cir. 1972), cert. granted, 93 S. Ct. 2770 (1973); Note, *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1267-68 (1971).

34. This principle was recognized as early as *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). See *Rogers v. Loether*, 467 F.2d at 1114 and citations therein; *Culpepper v. Reynolds Metals Co.*, 1296 F. Supp. at 1241 and citations therein; 9 WRIGHT & MILLER, *supra* note 3, § 2302, at 16.

35. See, e.g., *Harkless v. Sweeny Independent School Dist.*, 427 F.2d 319 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971). Mildred Harkless and 11 other teachers at an all-black school were not re-hired when the school district integrated in 1966. Alleging that their dismissal was racially motivated, the 12 teachers asked the court to issue preliminary and permanent injunctions compelling the school board to re-hire them and to require "defendants to reimburse plaintiffs for all back pay and other allowances which plaintiffs would have received but for their dismissal . . ." They also sought costs and attorney fees. *Harkless v. Sweeny Independent School Dist.*, 278 F. Supp. 632, 634 (S.D. Tex. 1968).

36. See *Brady v. T.W.A.*, 196 F. Supp. 504, 507 (D. Del. 1961). In *Horton v. Lawrence County Bd. of Educ.*, 449 F.2d 793 (5th Cir. 1971), the court expressed the same idea by stating that back pay was "integral" to the injunctive relief granted, implying that the back pay claim did not require separate consideration in determining whether defendant was entitled to a jury trial. The alternate word choice may also indicate that the court took back pay per se to be an equitable remedy; this is error. See p. 407 *infra*.

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clean-up" doctrine³⁷ was conclusively rejected in *Dairy Queen, Inc. v. Wood*.³⁸ There the Supreme Court held that the issues underlying a claim for damages must be tried to a jury³⁹ even though the claim for damages was merely incidental in magnitude to a claim for equitable relief, provided law is otherwise adequate to deal with the claim. Any application of the "equitable clean-up" doctrine after *Dairy Queen* would apparently contravene the Court's thinking.⁴⁰

Finally, courts which have refused to empanel juries in actions for back pay have argued that the damages sought are in the nature of restitution, and that restitution is an equitable remedy.⁴¹ The theory of restitution is that defendant holds ill-gotten gains received from plaintiff.⁴² In seeking contract damages, on the other hand, plaintiff asks to be placed in the position he would have occupied had the contract been lawfully made and performed.⁴³ The latter remedy is based on the expectation interest; the former seeks to restore the status quo.

The restitution theory is of dubious value in denying jury trial because the exclusively equitable nature of the remedy is suspect. Restitution could historically have been sought in an indebitatus assumpsit action at law,⁴⁴ and under the Court's theory of the Seventh Amendment no right should be considered equitable in nature unless it cannot be asserted adequately at law. A more serious difficulty with the restitution argument, however, is that it is logically inapplicable

37. See generally 9 WRIGHT & MILLER, *supra* note 3, § 2308, at 42-43; Note, *Right to Trial By Jury in Declaratory Judgment Actions*, 3 CONN. L. REV. 564, 572-73 (1971). But see 5 MOORE'S FEDERAL PRACTICE ¶ 38.16[4], at 162.9 n.9 (2d ed. 1971).

38. 369 U.S. 469 (1962).

39. *Id.* at 470-73.

40. See note 37 *supra*. But cf. *Swofford v. B & W, Inc.*, 336 F.2d 406, 414 (5th Cir. 1964).

41. See, e.g., *Porter v. Warner*, 328 U.S. 395 (1946) (Emergency Price Control Act of 1942); *Hodgson v. Food Fair Stores, Inc.*, 329 F. Supp. 102 (M.D. Pa. 1971).

42. 5 MOORE'S FEDERAL PRACTICE ¶ 38.24[2], at 190.5 (2d ed. 1971). For restitution to be proper, defendant must have received something of value from the plaintiff's hands. 5 CORBIN ON CONTRACTS § 1107, at 573 n.21 (1964).

43. In a damages claim plaintiff asks to be put "in as good a position as he would have occupied if there had been full performance." 5 CORBIN ON CONTRACTS § 1102, at 548 (1964); 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1339, at 204 (3d ed. 1968); 12 *id.* § 1454, at 2-4 [hereinafter cited as WILLISTON ON CONTRACTS]. Consistent with a damages theory, plaintiff might ask for all consequential and reliance damages such as emotional injury and lost opportunity costs. C. MCCORMICK, LAW OF DAMAGES § 163, at 635 (1935); 11 WILLISTON ON CONTRACTS § 1361, at 315 n.5; RESTATEMENT OF CONTRACTS § 329 & comment a (1932).

44. Corbin contends that restitution could be accomplished at law by an indebitatus assumpsit action. See 5 CORBIN ON CONTRACTS § 1103, at 557 (1964, Supp. 1971); *Myzel v. Fields*, 386 F.2d 718, 741 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968). If this remedy is adequate, there is no reason to move the action into equity.

Porter v. Warner, 328 U.S. 395 (1946), intimated that restitution would be an equitable remedy in the instant circumstances. See also *United States v. Cowen's Estate*, 91 F. Supp. 331 (D. Mass. 1950). But see *United States v. Jepson*, 90 F. Supp. 983 (D.N.J. 1950).

to actions based on discriminatory discharge.⁴⁵ In such actions the plaintiff has no claim for the value of uncompensated labor; he has passed no quid pro quo; he seeks relief based on what he expected to earn, rather than on the value of what he has already earned.⁴⁶

Finally, the restitution argument is of little value when plaintiff seeks damages other than lost wages. In a Title VIII housing discrimination action, for instance, plaintiff may seek actual damages and punitive damages up to a statutory limit.⁴⁷ The return of a rent overcharge is arguably a restitution claim, but money compensation sought for a refusal to rent cannot be so characterized. Nor can the restitution argument cover plaintiff's claims in an employment discrimination suit for punitive damages, compensation for emotional distress, or moving expenses.⁴⁸ These are claims for damages, properly tried to a jury,⁴⁹ unless an alternate rationale can be advanced for upholding the congressional label.

II

The Supreme Court has expounded its modern view of the Seventh Amendment in the trilogy of *Beacon Theatres, Inc. v. Westover*,⁵⁰ *Dairy Queen, Inc. v. Wood*,⁵¹ and *Ross v. Bernhard*.⁵² In these cases the Court rejected the notion that the application of the Seventh

45. For example, under Title VII, see *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232 (N.D. La. 1969), *rev'd on question of statute of limitations*, 421 F.2d 888 (5th Cir. 1970).

46. The expectation nature of the so-called "back pay" claim is emphasized by the fact that back pay awards are reduced by the amounts earned in alternate employment undertaken after dismissal. See, e.g., *McBeth v. Board of Educ.*, 300 F. Supp. 1270 (E.D. Ark. 1969).

47. 42 U.S.C. § 3612(c) (1970).

48. See, e.g., *Stamps v. Detroit Edison Co.*, 42 U.S.L.W. 2200 (E.D. Mich. 1973) (court awarded \$4,250,000 in punitive damages); *Williams v. Albemarle City Bd. of Educ.*, 5 E.P.D. ¶ 8592 (M.D.N.C. 1973) (court granted damages for moving expenses, job-finding expenses, loss of salary, costs, and attorney's fees), *aff'd in part, vacated on the issue of mitigation of damages and remanded*, 6 E.P.D. ¶ 8870 (4th Cir. 1973); *Humphrey v. Southwestern Portland Cement Co.*, 5 E.P.D. ¶ 8501 (W.D. Tex. 1973); cf. *Wall v. Stanly County Bd. of Educ.*, 378 F.2d 275 (4th Cir. 1967); *Lucia v. Duggan*, 303 F. Supp. 112 (D. Mass. 1969).

49. Many courts believe jury trial is unsuited for civil rights actions. See, e.g., *Lawton v. Nightingale*, 345 F. Supp. 683 (N.D. Ohio 1972); *Hayes v. Seaboard Coast Line R.R.*, 46 F.R.D. 49, 53 (S.D. Ga. 1969).

Commentators and at least one court, on the other hand, have observed that the rationalia used to deny jury trial in § 1983 and Title VII "back pay" actions have not been thoroughly convincing. See *Ochoa v. American Oil Co.*, 338 F. Supp. 914 *passim* (S.D. Tex. 1972); Davidson, "Back Pay" Awards Under Title VII of the Civil Rights Act of 1964, 26 RUTGERS L. REV. 741, 772-73 (1973); Comment, *supra* note 4, at 180; Note, *Right to Jury Trial in Section 1983 Damage Actions*, 24 CASE W. RES. L. REV. 406 (1973).

50. 359 U.S. 500 (1959).

51. 369 U.S. 469 (1962).

52. 396 U.S. 531 (1970).

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Amendment compels categorization of rights and remedies as legal or equitable on a basis rigidly historical.⁵³

The Court has held in effect that procedural developments such as the 1938 merger of law and equity⁵⁴ have narrowed the sphere of law's inadequacy and thus expanded the right to civil jury trial.⁵⁵ In *Beacon Theatres* defendant asserted a counterclaim to a suit for a declaratory judgment and an injunction.⁵⁶ The equitable nature of the issues raised in the complaint would have warranted a chancellor in 1791 in enjoining prosecution of the damages claims pending resolution of the equitable suit.⁵⁷ This would have greatly curtailed the right to jury trial, since many of the underlying factual issues determined in the equitable proceeding would be entitled to res judicata effect in a later trial on the legal claims. Even after the 1938 merger of law and equity the trial judge had great discretion in determining the order of the trial of the issues.⁵⁸ The Court noted, however, that in the merged system a jury could be empaneled to try legal claims no matter when they were raised in the course of a jury trial.⁵⁹ Law's new-found post-merger adequacy thus provided the right to jury trial of the legal claims asserted by the defendant in *Beacon Theatres*.

In *Dairy Queen*⁶⁰ plaintiff sought an injunction restraining an alleged patent infringement and an accounting of profits lost through the infringement. The injunction was of course equitable in nature;⁶¹ the accounting was historically either an equitable remedy⁶² or a legal remedy which the chancellor might award as incidental to any equitable relief granted.⁶³ The Court held that neither the equitable label

53. See also *Galloway v. United States*, 319 U.S. 372, 392 (1943). ("[T]he Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details . . .")

54. FED. R. CIV. P. 18(a).

55. "It was settled in *Beacon Theatres* that procedural changes which remove inadequacy of a remedy at law may sharply diminish the scope of traditional equitable remedies by making them unnecessary in many cases." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 n.19 (1962).

"Since in the federal courts equity has always acted only when legal remedies were inadequate, the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509 (1959).

See *McCoid, Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1, 12-13 (1967).

56. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 502-03 (1958).

57. 5 MOORE'S FEDERAL PRACTICE ¶ 38.11[p-2], at 128.9 (2d ed. 1971).

58. *Id.* See also *Beacon Theatres, Inc. v. Westover*, 252 F.2d 864, 878 (9th Cir. 1958).

59. 359 U.S. 500, 508-11 (1959).

60. 369 U.S. 469 (1962).

61. See 5 MOORE'S FEDERAL PRACTICE ¶ 38.24[1], at 190 (2d ed. 1971).

62. 5 *id.* ¶ 38.25, at 198; *Belsheim, The Old Action of Account*, 45 HARV. L. REV. 466 (1932).

63. 5 MOORE'S FEDERAL PRACTICE ¶ 38.25, at 198 (2d ed. 1971).

of the relief sought nor the small magnitude of the monetary claim could prevent jury trial upon demand of what amounted to a legal claim for damages.⁶⁴ Law therefore was considered adequate to try that claim.

In *Ross v. Bernhard*⁶⁵ the Court disposed of another procedural obstacle to law's jurisdiction. *Ross* was a shareholder's derivative suit alleging that a third party controlled the corporation through an illegally large representation on the board of directors and used that control to the corporation's detriment. The Court noted that such a suit, despite its traditionally equitable nature, involved both the plaintiff's right to sue on the corporation's behalf⁶⁶ and the merits of the underlying claim which could often be, as it was in *Ross*, legal in nature. The Court held that the right to jury trial existed as to the issues raised by the underlying corporate claim, since "after the adoption of the [Federal] Rules [of Civil Procedure] there is no longer any procedural obstacle to the assertion of legal rights before juries, however the party may have acquired standing to assert the rights."⁶⁷ Trying the legal issues to a jury would no longer subject the parties to the awkwardness of litigation in two separate forums as it would have before merger.

While these cases hold that procedural obstacles will no longer stand in the way of jury trial, they do not clearly resolve the matter of what precisely are "legal" issues. On this point the Court indicated in a footnote in *Ross*:

As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.⁶⁸

64. 369 U.S. at 469, 473-79.

65. 396 U.S. 531 (1970).

66. *Id.* at 534-35.

67. *Id.* at 547.

68. *Id.* at 538 n.10.

The *Ross* footnote test was applied in the following cases: *Farmers-Peoples Bank v. United States*, 477 F.2d 752, 756-57 (6th Cir. 1973); *Rogers v. Loether*, 467 F.2d 1110, 1118 (7th Cir. 1972), *cert. granted*, 93 S. Ct. 2770 (1973); *Dawson v. Contractors Corp.*, 467 F.2d 727, 734, 736 (D.C. Cir. 1972) (Fahy, J., dissenting). By "issue" the Court apparently meant those questions of fact underlying the claims or rights asserted by litigants. For the purposes of applying the Seventh Amendment the terms issue, claim, and right seem interchangeable. "Claim" and "issue" are used interchangeably by Justice White for the Court in *Ross*, 396 U.S. at 537-38. Justice Stewart, in dissent, *id.* at 543, interchanges "right" and "claim," *id.* at 545. Conceptually, one can regard an alleged "right" as the basis of a "claim" which raises fact "issues."

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These three criteria taken together with *Beacon* and *Dairy Queen* suggest that the Amendment distinguishes between law and equity according to the fundamental principle underlying the evolution of the bifurcated English judicial system: that equity would take jurisdiction where a litigant could not adequately assert his right at law.⁶⁹ Each of the three prongs of the *Ross* test manifests a distinct aspect of the principle of inadequacy. First, law is considered inadequate if no common law writ by which the claim can be asserted is available. The Court goes out of its way to cast doubt upon the present utility of this part of the *Ross* test. The narrowness of the ancient common law forms of action no longer confines the court in fashioning relief, as the Court noted in *Dairy Queen*.⁷⁰ The second prong embodies the recognition that law's inadequacy might be remedial: Injunctions are available only in equity.⁷¹ This remedial test has become the prime working criterion for courts ruling on a motion for jury trial.⁷² Finally, law may be inadequate because of its procedures. The third *Ross* test draws attention to the primary modern source of procedural inadequacy at law, jury trial.

The lineage of the third part of the *Ross* test is long and distinguished. Equity historically took jurisdiction upon allegations of a wide variety of procedural inadequacies of law courts.⁷³ Law was once inadequate for instance because of rules against multifarious actions,⁷⁴ or because of law's limited provision for discovery.⁷⁵

Many of law's historically recognized procedural inadequacies, however, have been overcome by the Federal Rules of Civil Procedure

69. C. LANGBELL, *supra* note 30, at 252-53; I G. SPENCE, *EQUITABLE JURISDICTION* 419 (1846). Billson notes that inadequacy was considered purely procedural by most commentators, but he argues that equity may have an ethical quality distinct from law. H. BILLSON, *EQUITY IN ITS RELATIONS TO COMMON LAW* 1-14 (1917). Any possible philosophical distinction was not, in theory at least, a source of conflict between law and early equity. See S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 84-85 (1960).

In American practice an allegation of an inadequate remedy at law has always been necessary before equity could take jurisdiction. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962); *Scott v. Neely*, 140 U.S. 106, 110 (1891); *Thompson v. Railroad Companies*, 73 U.S. (6 Wall.) 134, 137 (1867); 1 J. POMEROY, *EQUITY JURISDICTION* §§ 217-18, at 367 *passim* (1941).

70. 369 U.S. at 477-79. See also *Simler v. Conner*, 372 U.S. 221, 223 (1963).

71. See note 61 *supra*.

72. See, e.g., *National Life Ins. Co. v. Silverman*, 454 F.2d 899, *aff'd on rehearing en banc*, 454 F.2d 917 (D.C. Cir. 1971).

73. J. STORY, *EQUITY PLEADING* § 473, at 480-81 (3d ed. 1843).

74. In *Shields v. Thomas*, 59 U.S. (18 How.) 253 (1855), the Supreme Court accepted appellees' contention that this rule in a court of law would force them to bring as separate suits a multi-plaintiff action which could be brought in a single bill in equity; this severance would render the remedy "uncertain." Summary of appellees' argument, *id.* at 254-55, and thus law was inadequate.

75. J. STORY, *EQUITY JURISPRUDENCE* § 67, at 65 (8th ed. 1861).

and the merger of law and equity.⁷⁶ But one such failing has not been mitigated by merger. As the Court indicated in *Dairy Queen* and in the *Ross* footnote, the inadequacy of jury trial may still provide grounds for holding a suit equitable.

In those two cases the alleged inadequacy of juries was their potential inability to understand complex fact questions. Such an inadequacy was not an allegation employed in 1791 to throw a suit into equity, but in calling attention to it the Court illustrates that the inadequacy principle is not merely a broken fragment of forgotten forms of pleading but the vital idea incorporated in the Seventh Amendment.⁷⁷

In its modern application of the Seventh Amendment, the Court has found that procedural developments have operated to narrow the realm in which law is inadequate. Changing circumstances, however, may operate to broaden it as well. An action may be deemed equitable where legal writs, legal remedies, or legal procedures, including jury trial, have become inadequate to render justice.

Nevertheless, the "abilities and limitations" clause has troubled commentators by its vagueness and seemingly unlimited potential for judicial tinkering⁷⁸ with the jury trial right. Finding the "abilities and limitations" clause opaque, they have in effect suggested that it be ignored.⁷⁹ The Court itself has not yet explicitly indicated the importance or means of applying the third part of the *Ross* test. But

76. *Ross* holds that "purely procedural impediments to the presentation of any issue by any party, based on a difference between law and equity, were destroyed" by the writing of the Federal Rules. 396 U.S. at 539-40.

Dairy Queen, 369 U.S. at 478 n.19, and *Beacon Theatres*, 359 U.S. at 509, indicate that law's historic remedial inadequacies have been reduced by modern changes in procedure. Arguably, the only modern remedial inadequacy of law is that forum's inability to grant injunctions. The only modern procedural inadequacy is the "abilities and limitations" of trial by jury.

77. For an early expression of the propriety of a mutable right to civil jury trial, see *THE FEDERALIST* No. 83, at 530 (B. Wright ed. 1961) (A. Hamilton):

The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society may render a different mode of determining questions of property preferable in many cases in which that mode now prevails.

A court has recently betrayed a similar concern over a rigid nonfunctional application of the Seventh Amendment. See *Gefen v. United States*, 400 F.2d 476, 479 (5th Cir. 1968), cert. denied, 393 U.S. 1119 (1969).

In fact equity jurisdiction has frequently grown at the expense of the common law. F. JAMES, *CIVIL PROCEDURE* § 8.2, at 341 (1965).

78. One court has evidenced a reluctance to commence such tinkering. "If the scope of equitable accounting is to be expanded to encompass cases felt to be too complex or esoteric for trial to a jury, we think that expansion must come from the Supreme Court." And in a footnote the court opines that such an expansion is not likely. *Tights, Inc. v. Stanley*, 441 F.2d 336, 341 & n.11 (4th Cir. 1971).

79. Note, *supra* note 5, at 129-33. Cf. Note, *supra* note 49, at 415-16; Note, *supra* note 10, at 618-19.

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in *Katchen v. Landy*,⁸⁰ decided four years before *Ross*, the Court foreshadowed, albeit inarticulately, the principle of jury inadequacy, under which a "legal" claim might be deemed to be equitable. Furthermore, the Court indicated the circumstances in which the principle of jury inadequacy might be invoked as a grounds for equitable jurisdiction: When Congress indicates in legislation which creates a statutory cause of action that the suit should be tried without a jury, courts should accede to that declaration. This congressional indication of inadequacy is the concept by which the third prong of the *Ross* test gains content and utility.

III

In *Katchen v. Landy*⁸¹ a bankruptcy trustee asserted and proved voidable preferences⁸² in response to a claim filed by the creditor who received the preferences. The issue before the Court was whether the bankruptcy court had summary jurisdiction under § 2a(2) of the Bankruptcy Act⁸³ to order the surrender of the preferences without a jury trial, and if so, whether this was unconstitutional. Petitioner's constitutional argument was based on the fact that absent the filing of a claim by the holder of an alleged preference, the return of a preference would require the trustee to initiate a plenary action in which the jury trial right would inhere, since such an action is analogous to a legal claim for debt.⁸⁴ To deprive him of this right, petitioner argued, merely because he had submitted to the jurisdiction of the bankruptcy court by filing a claim, would contravene the Court's holding in *Beacon*. The Court there had stated that since merger had obviated the procedural awkwardness of litigating in two forums,

80. 382 U.S. 323 (1966).

81. *Id.*

82. A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. Section 60a(1), 11 U.S.C. § 96(a)(1) (1970).

83. 11 U.S.C. § 11(a)(2) (1970) accords the bankruptcy court power to allow and disallow claims in a summary proceeding. Section 57g of the Act, 11 U.S.C. § 93(g) (1970), permits the trustee to object to the allowance of a claim in such a proceeding on grounds that the claimant has received a preference. In passing upon an objection the court must determine the amount of the preference, a determination which would ordinarily be made by a jury if the trustee had sought to recover the preference in a plenary action under § 60b, 11 U.S.C. § 96(b) (1970). Since the normal rules of res judicata apply, however, the bankruptcy court's summary adjudication of the preference issue raised by the trustee's objection under § 57g will operate to deprive the claimant of his jury trial right on that issue.

84. 382 U.S. at 327-28.

the right to jury trial of legal issues could no longer be lost through prior determination of equitable claims having res judicata effect.

The Court disagreed. Noting that it had reserved the possibility in *Beacon* and *Dairy Queen* that there might be situations in which it would permit equitable proceedings to foreclose a jury trial right,⁸⁵ the Court held that the Seventh Amendment did not guarantee a right to jury trial in the circumstances. Great stress was laid upon the congressional indication:

In neither *Beacon Theatres* nor *Dairy Queen* was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury. We think Congress intended the trustee's § 57g objection to be summarily determined; and to say that because the trustee could bring an independent suit against the creditor to recover his voidable preference, he is not entitled to have his statutory objection to the claim tried in the bankruptcy court in the normal manner is to dismember a scheme which Congress has prescribed.⁸⁶

The fact that the Bankruptcy Act is administered in bankruptcy courts which have traditionally been considered courts of equity⁸⁷ does not diminish the importance of the *Katchen* decision. Title VII of the 1964 Civil Rights Act provides for nonjury trial of damage claims which, though legal in nature, might historically have been awarded by an equity court as incidental to the equitable remedy of reinstatement. *Dairy Queen* would seem to mandate a revision of the historical pattern. And *Beacon Theatres* would also seem to mandate a jury trial of a claim traditionally subsumed in the equitable nature of the Bankruptcy Court. But though *Beacon* and *Dairy Queen* undermined the traditional bases of equity jurisdiction, the Court acknowledged in *Katchen* that the existence of a specific statutory scheme might suffice to protect prior practice from the effects of the Court's expansion of the jury trial right.

In view of *Katchen's* emphasis on the significance of the congressional scheme⁸⁸ it is not surprising that the Court has never rejected

85. *Id.* at 339-40.

86. *Id.* at 339.

87. See, e.g., *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934).

88. 382 U.S. at 330-36.

Another case in which the Court acceded to a congressional designation was *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). In *Glidden* the Court faced a congressional declaration that the Court of Claims and the Court of Customs and Patent Appeals were both Article III courts. No strong policy militated against this labeling, save for stare decisis: The Supreme Court had previously held they were Article I courts. In overruling the precedent, Justice Harlan, writing for the majority, seemed to regard the

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a congressional indication that an action is equitable in nature.⁸⁹ Most lower courts, with the Seventh Circuit in *Rogers*⁹⁰ an exception, have followed this lead.⁹¹ Congressional characterization of statutory actions as equitable is properly regarded as the means for courts to invoke the third part of the *Ross* test to hold that rights which cannot be adequately asserted before a jury are thus equitable in nature. In other words, the congressional declaration has the force of a judicial ruling⁹² on jury inadequacy, which as the Court has explained, is part of the meaning of the Seventh Amendment.⁹³

Courts ought to leave the burden of determining the inadequacy

congressional declaration as, first, a stimulus for reevaluation of the Court's posture on the issue, and, second, an answer to the question before the Court. If the Court of Claims and the Court of Customs and Patent Appeals had the characteristics of Article III courts and if, as Congress now indicated, they are intended to be Article III courts, the majority opinion seemed to say, then they must be, and always have been, Article III courts.

In effect the *Glidden* majority considered the congressional label for the two courts as presumptively correct. The Court expressed this presumption obliquely. The Justices reconsidered the Court's earlier decision and decided that congressional intent plus the general nature of modern practice in the two courts dictated that they might well be considered Article III courts. And so, prospectively and retrospectively, they were to be considered such.

89. In other holdings that a variety of claims are equitable, one may perceive the importance of congressional intent. For instance, in *Porter v. Warner*, 328 U.S. 395, 397-98 (1946), the Court found broad equitable power to be granted by Congress to courts in the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23; the powers were necessarily broad, the Court seemed to say, in order to effectuate completely the purposes of the Act.

In *Mitchell v. De Mario Jewelry, Inc.*, 361 U.S. 288 (1960), the Court held that an equitable action for reinstatement of a dismissed employee brought on the employee's behalf by the Secretary of Labor under § 17 of the FLSA, 29 U.S.C. § 217 (1970), could properly include as equitable a claim for lost wages. Congress had amended the Act to remove from the section's coverage claims for unpaid overtime and minimum wages, restricting these claims to actions initiated by the employee himself under § 16(b). The Court held that claims for unpaid overtime wages were distinct from the claim asserted for wages lost by wrongful discharge and that the legislative amendment had not stripped an equity court of the power to award the latter.

The Court justified its treatment of the back pay claim as equitable and therefore within the scope of § 17 by an appeal to the historic power of equity to provide complete relief in light of the statutory purposes. Reference is made to inherent equitable powers. This may indicate a characterization of the claim as restitutive or incidental to injunctive relief also sought. (*De Mario Jewelry* was decided two years before *Dairy Queen* apparently curtailed equity "clean-up" jurisdiction.) However, the case is also consistent with the theory that equitable jurisdiction may be predicated on a congressional indication that jury trial is inappropriate. Congress must have been aware when it amended the statute that § 17 had long been interpreted to authorize the award of back pay; its failure to withdraw that authorization in narrowing the scope of an obviously equitable section might be read as a declaration that jury trial was inappropriate for the back pay remedy.

90. 467 F.2d 1110 (7th Cir. 1972), cert. granted, 93 S. Ct. 2770 (1973).

91. The major example is the judicial response to congressional desire for nonjury trial under Title VII. See note 7 *supra*.

92. This is the second of the four ways in which, Roscoe Pound argued, common law courts might approach legislative material. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908). See Note, *The Legitimacy of Civil Law Reasoning in the Common Law: Justice Harlan's Contribution*, 82 YALE L.J. 258, 266-69 (1972).

93. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 n.19 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509 (1959). See also p. 408 *supra*.

of jury trial to Congress. Congress is the branch of government best suited to undertake investigative functions⁹⁴ necessary to determine the adequacy or inadequacy of trial by jury in a newly created statutory cause of action. More important, it is likely that no scientific conclusion can be reached on the matter.⁹⁵ Any decision on the adequacy of jury trial ought to be the result of an openly political consensus, and only Congress can arrive at such a consensus. In *Katchen*, the only post-1938 case where the Court recognized a legal inadequacy of the sort enunciated four years later in the third criterion of the *Ross* test, the Court placed great emphasis on the existence of a statutory scheme.

A court would of course need some clear sign from Congress before proceeding to limit the right to jury trial in any way. In many instances the language of the statute will provide a clear indication of congressional intent. For instance, "the court" may be given the power to "restrain" violations of the statute.⁹⁶ By this language in § 17 of the Fair Labor Standards Act⁹⁷ Congress described relief in the nature of an injunction; since the relief is equitable, nonjury trial is dictated.⁹⁸

In some statutes the language does not so clearly prescribe equity trial. Under § 16(b) of the Fair Labor Standards Act,⁹⁹ for instance, Congress established a cause of action to be brought by an employee for unpaid minimum wages and overtime pay. Under this statute, the "court . . . in addition to any judgment awarded to the plaintiff" was to "allow a reasonable attorney's fee." The use of the word "court" in this context, with no indication that the court ought to shape an equitable remedy, cannot justify a ruling that Congress intended nonjury trial. Courts have quite properly held that the judge's responsibility under this provision is restricted to the award of attor-

94. See Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 508 (1908).

95. F. JAMES, CIVIL PROCEDURE 378 (1965).

96. 29 U.S.C. § 217 (1970): "The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including . . . the restraint of any withholding of payment of minimum wages or overtime compensation . . ."

97. 52 Stat. 1059, 1069 (1938), as amended 29 U.S.C. § 217 (1970).

98. See *Wirtz v. Jones*, 340 F.2d 901 (5th Cir. 1965). See generally Note, *supra* note 18. The author concludes that jury trial should "be afforded on the factual issues raised by the claim for unpaid wages" in an action under § 217, *id.* at 529. This conclusion is dictated by the standard modern reading of the Seventh Amendment, but according to this Note the "inadequacy principle" as invoked by expressed congressional intent to have nonjury trial authorizes equity trial for § 217 actions.

99. 29 U.S.C. § 216(b) (1970). Section 216(c) authorizes the Secretary of Labor to bring actions such as those authorized in § 216(b) on behalf of an employee.

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ney's fees and does not include the award of the money judgment contemplated by the statute.¹⁰⁰

In Titles VII¹⁰¹ and VIII,¹⁰² however, the use of the phrase "the court" indicates that Congress contemplated only nonjury trial.¹⁰³ The latter statute provides in a single sentence that "the court" may grant injunctive relief and actual and punitive damages.¹⁰⁴ Since it would be extraordinary for Congress to make injunctive relief available in a jury trial, and extremely unlikely that the meaning of the word "court" would change in the midst of the sentence, it must be assumed that it was used throughout to distinguish judge from a jury. Doubt as to this conclusion might be resolved by reference to the legislative history.¹⁰⁵ It may be expected that as Congress becomes aware of its power to denominate actions equitable or legal it will take greater care in expressing its preferences clearly.

Of course, any congressional characterization of a statutory action as equitable would at a minimum have to meet the criterion of rationality,¹⁰⁶ but this would undoubtedly prove a minor hurdle. The courts might also accept congressional determination of jury inadequacy only where there is possible juror bias against minority groups. Such a limitation is not wholly unprincipled. It would authorize Congress to limit jury trial in furtherance of the fundamental values protected by the Fourteenth Amendment while denying it the power to curtail the right for purposes of lesser constitutional stature.

This limitation, however, does not withstand analysis. First, the *Katchen* case is an instance of judicial acquiescence to a congressional label founded upon the inefficiency of jury trial rather than its pos-

100. See *Lewis v. Times Pub. Co.*, 185 F.2d 459 (5th Cir. 1950); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273 (W.D. Pa. 1947).

101. 42 U.S.C. §§ 2000e et seq. (1970), as amended 42 U.S.C.A. §§ 2000e et seq. (West Supp. 1973).

102. 42 U.S.C. §§ 3601 et seq. (1970).

103. As to Title VII, see Comment, *supra* note 4, at 169-71. As to Title VIII, see Brief for Petitioner at 19-24, *Rogers v. Loether*, cert. granted, 93 S. Ct. 2770 (1973) (Sup. Ct. docket no. 72-1035).

104. 42 U.S.C. § 3612(c) (1970).

105. The legislative histories of both civil rights statutes indicate that nonjury trial was thought necessary to ensure achievement of the purposes of the legislation. As to Title VII, see *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232, 1239 & n.5 (N.D. Ga. 1969), *rev'd on question of statute of limitations*, 421 F.2d 888 (5th Cir. 1970); see also note 113 *infra*.

As to Title VIII, see Brief for Petitioner at 10 *passim*, *Rogers v. Loether*, cert. granted, 93 S. Ct. 2770 (1973) (Sup. Ct. docket no. 72-1035); see also note 113 *infra*.

The legislative history of § 16 of the FLSA by contrast does not reveal the same concerns. Cf. Note, *supra* note 18, at 514-16.

106. Legislation purporting to find jury trial inadequate in all actions filed on even-numbered dates would be an example of a congressional determination which failed to meet the test of rationality.

sibilities for juror bias.¹⁰⁷ In addition such an ad hoc limitation seems indefensible if the Seventh Amendment is to be regarded as expressing the flexible principle of equitable jurisdiction: Inadequacy can manifest itself at different times in different ways.

An alternate limitation upon the congressional power to determine jury inadequacy would be that the legislative mandate for nonjury trial would not be permitted to curtail the jury trial right in actions belonging to a "common law core," that is, those actions unmistakably cognizable in common law courts in 1791 in England. Civil rights actions, although they can be analogized to certain common law actions existing in 1791,¹⁰⁸ are not themselves part of this core and could be held equitable upon the strength of the congressional intent; the traditional requirement that newly created causes of action be analogized to their common law antecedents would be disregarded in the face of a positive congressional designation. But Congress would not have the power to enact a statute which merely labeled as equitable, for example, simple trespass actions for damages brought in federal courts under diversity jurisdiction.¹⁰⁹ Such common law core actions would be immutably fixed in their legal characterization.

Such a limitation would render the inadequacy principle a much less radical interpretation of the Seventh Amendment. In addition it would confine the principle to areas in which it has already been applied. After all, Congress has never attempted to abolish the right to jury trial in an action which existed as long ago as 1791, and thus the courts have never been called upon to sanction such a step.

On the other hand, this distinction between post-1791 actions and a common law core, in which Congress would be forbidden to tamper with traditional jury trial rights, might prove upon closer inspection to be more illusory than real, and it might involve the courts in the kind of arcane historical inquiry which the Court viewed with evident disfavor in *Ross*.¹¹⁰

107. See p. 413 *supra*.

108. See *Kastner v. Brackett*, 326 F. Supp. 1151, 1152 (D. Nev. 1971), where the court likened a damages action under Title VIII to assumpsit and to deceit, both being actions at law.

109. 28 U.S.C. § 1332 (1970).

110. A rigorously logical application of the inadequacy principle would seemingly demand that no limitation be placed upon its scope. Such an interpretation of the Seventh Amendment would no more amount to an unwarranted judicial supineness in the face of the congressional will than does the present limited judicial review of congressional exercises of power under the Commerce Clause, and the considerations favoring the abolishment of civil jury trial may soon be as strong as those which have induced the far-reaching congressional exercise of Commerce Clause powers. For discussion of some drawbacks to jury trial, see, *e.g.*, J. FRANK, *COURTS ON TRIAL* 108-45

IV

When applied to claims asserted under Title VII of the 1964 Civil Rights Act and Title VIII of the 1968 Act, this concept of conformance to congressional characterizations of actions as legal or equitable requires the conclusion that jury trials are inadequate in suits brought under those statutes. Both statutes on their faces indicate that Congress did not contemplate jury trials in suits brought under their provisions; the language specifies that "the court" may grant appropriate relief.¹¹¹ The respective legislative histories also reveal that Congress determined that jury trial was inadequate in these actions.¹¹² These legislative judgments easily meet the test of rationality. Congress was concerned that juror bias might frustrate the enforcement of the substantive rights conferred by the acts.¹¹³ No evidence exists to show

(1950); J. FRANK, *LAW AND THE MODERN MIND* 170-85, 302-09 (1935); H. KALVEN & H. ZEISEL, *DELAY IN THE COURT* (1959); Note, *supra* note 5, at 123-26.

England has drastically curtailed the jury trial right without any notable negative effects. In 1972, out of 1,129 trial actions before the Queen's Bench, jury trial was had in only 23. *CIVIL JUDICIAL STATISTICS FOR THE YEAR 1972*, at 37, Table 8 (1973). For a cogent argument illuminating the importance of jury trial in shaping sound substantive law, however, see S.F.C. MILSON, *supra* note 69, at 69-80.

111. 42 U.S.C. § 2000e-5(g) (Supp. II 1972): "If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."

See also Comment, *supra* note 4, at 169-71.

Section 812(c) of Title VIII, 42 U.S.C. § 3612(c) (1970) provides: "The Court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff" See Brief for Petitioner at 10, *Rogers v. Loether*, cert. granted, 93 S. Ct. 2770 (1973) (Sup. Ct. docket no. 72-1035).

112. See 110 CONG. REC. 7255 (1964) (Title VII). As to Title VIII the legislative intent is not quite as clear. An earlier version of Title VIII, not enacted by Congress, provided like the present statute that damages could be awarded by "the court." S. 3296 § 406(c), 89th Cong., 2d Sess.; 112 CONG. REC. 9397 (1966). At the hearings on the bill Attorney General Nicholas Katzenbach told Senator Sam Ervin that "I assume if there was a suit here that was for purely damages that the court would use a jury." Katzenbach was apparently referring to advisory juries. Senator Ervin asked the Attorney General if he would object to an amendment spelling out the right to jury trial of issues of fact underlying a damages claim under Title VIII. But no such amendment was passed. *Hearings on S. 3296 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 2, at 1178 (1966).

113. See, e.g., 110 CONG. REC. 8660 (Remarks of Senator Morse), 9819 (Remarks of Senator Javits), 12958 (Remarks of Senator Humphrey) (1964).

Combined hearings on Title VIII and the Jury Selection and Service Act included testimony regarding the refusal of southern juries to find against white defendants in civil rights cases. See *Hearings Before a Subcomm. of the House Judiciary Comm.*, 89th Cong., 2d Sess. 1183 (Remarks of Attorney General Katzenbach), 1321 (Remarks of Congressman Ryan), 1331 (Remarks of Congressman Diggs), 1515 (Remarks of Whitney Young) (1966). The congressional concern over the problem of enforcing civil rights legislation by jury trial is comprehensively discussed in Brief for Petitioner at 19-24, *Rogers v. Loether*, cert. granted, 93 S. Ct. 2770 (1973) (Sup. Ct. docket no. 72-1035). See, e.g., *Hearings, supra* at 1309-10.

that this fear was an irrational one. In fact jury bias was one ancient reason for the rise of equity.¹¹⁴ In the fourteenth and fifteenth centuries¹¹⁵ plaintiffs were able to resort to chancery by alleging jury bias as the reason that law was not adequate to give them relief.¹¹⁶ As time went on the law courts developed their own measures such as the attaint jury¹¹⁷ and the grant of a new trial¹¹⁸ to combat jury bias.¹¹⁹ These remedies may not have ensured law's adequacy; as late as 1674 a common law judge is heard complaining that the losing party in an action decided against the weight of evidence will repeat the action again in an equitable court.¹²⁰ By 1791, however, jury bias was apparently overcome by legal rather than equitable means.¹²¹

Of course litigants have long cast their actions in equitable form in order to avoid jury trial. Yet fewer allegations of law's inadequacy survive to prevent jury trial.¹²² Even as plaintiffs find themselves less able to avoid jury trial, however, they may also find the historic remedies for jury bias to be less effective. With respect to civil rights actions, at any rate, jury bias might inevitably hamper the pursuit of justice, no matter how many new trials were granted.¹²³

114. Chancery originally was the source of writs granted to the other royal courts. For reasons not entirely clear, it gradually developed its own jurisdiction. *See generally* S.F.C. MILSOM, *supra* note 69, at 74-87.

115. Saxby v. Laurence, 1 Cal. xxxii (15th C.) (plaintiff unable to obtain common law remedy because defendant, who had thrown down plaintiff's house, was the influential and powerful under-sheriff of the city of Norwich); George v. Reyneford, 1 Cal. lxxxiii (15th C.) (defendant prays that cause be removed to chancery because plaintiff in trespass action had "grete knowlage and favor in the cite," while defendant was but "a straungier"); Abbot v. Stanley, 1 Cal. xxxiii (15th C.) (bill complaining that defendant refused for 21 years to pay rent for certain premises held by her of plaintiffs', and assaulted and threatened those who came to demand it; on account of defendant's powerful connections—she was the prioress of a convent—plaintiffs alleged they had no remedy at common law); Bowman v. Fote, 1 Cal. ci (15th C.) (defendant in trespass action seeks an equitable remedy because he was a stranger in London where the plaintiff was well-known, and no attaint was available there); Scadewell v. Stormesworth, 1 Cal. v. (14th C.) (plaintiff seeks to have cause transferred to equity because defendant boasted that "il avroit chare de pardon en despit de ses enemys"); *see* D.M. KERLY, AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 70-73 (1890); S.F.C. MILSOM, *supra* note 69, at 77.

116. This bias does not appear to have been racial, of course; law was inadequate, for instance, because the jury would be intimidated by the defendant's role in the community and would not give testimony or decide facts against defendant. *See* S.F.C. MILSOM, *supra* note 69, at 77.

117. J. B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (PART I: DEVELOPMENT OF TRIAL BY JURY) 140 (1896).

118. F. BULLER, TRIALS AT NISI PRIUS 326-27 (1785).

119. Two early actions were created by statute evidently to achieve the same purpose. The first, in 1433, allowed damages against perjuring jurors. St. 11 Henry 6, c. 4. The second, in 1436, increased the property qualifications of attaint jurors. St. 15 Henry 6, c. 5.

The Star Chamber was also used for punishing perjuring jurors. S.F.C. MILSOM, *supra* note 69, at 366; J.B. THAYER, *supra* note 117, at 162-63.

120. *See* Martyn and Jackson, 3 Keble 398 (1674).

121. *See* F. BULLER, *supra* note 118.

122. *See* p. 409 *supra*.

123. On juror bias as grounds for a new trial *see* 6A MOORE'S FEDERAL PRACTICE ¶ 59.08[4], at 59-124 (2d ed. 1973).

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A further effect of the principle of inadequacy as determined by Congress is that the legislature would be able to expand the remedies presently permitted under Title VII to include all forms of apparently legal relief without importing the jury trial right. Since Congress might determine that a plaintiff could not receive an adequate hearing at law, any claim might be heard by a judge sitting as an equity chancellor. Recognition of the principle would also effectuate the congressional intent in any other statutory scheme where jury trial may threaten to thwart legitimate legislative goals.¹²⁴

While the principle of congressionally determined inadequacy resolves the jury trial issue as to the modern statutory civil rights actions, it does not conclusively resolve the same question posed by statutes such as § 1983.¹²⁵ The language of the Civil Rights Act of 1871, unlike its modern relations, does not express a congressional intent that the suits it authorizes be tried in equity. The language shows in fact that both court and jury trials were contemplated.¹²⁶

On the other hand, the likelihood of jury bias is no less in § 1983 employment or housing discrimination suits than under analogous actions brought under Title VII or Title VIII. The legislative history of § 1983 does show some congressional apprehension that the substantive rights conferred by the statute would prove unenforceable because of jury bias.¹²⁷ Moreover, it would be anomalous for a court denying a motion for jury trial in one of the modern civil rights actions to grant the same motion in the identical suit brought under § 1983.¹²⁸ The courts' characterization of these suits as equitable can

124. The argument in this Note is that the inadequacy principle is the soundest rationale for holding as equitable all statutory actions which Congress declared appropriate for nonjury trial. The principle may be said to sanction the equity appellation for actions brought under the following statutes: 42 U.S.C. § 3612(c) (1970) (housing discrimination); 42 U.S.C.A. §§ 2000e *et seq.* (West Supp. 1973) (employment discrimination); 29 U.S.C. § 217 (1970) (violation of Fair Labor Standards Act prosecuted by Secretary of Labor); 11 U.S.C. § 11(a)(2) (1970) (Bankruptcy Act).

125. Courts of appeal have held that in a § 1983 employment discrimination action for reinstatement and back pay there is no right to a jury trial. *See* note 7 *supra*. But § 1983 damage actions generally import the jury trial right. *See* Note, *supra* note 10, at 630-31.

126. 42 U.S.C. § 1983 (1970) provides for liability "in an action at law, suit in equity, or other proper proceeding for redress."

127. *See* CONG. GLOBE, 42d Cong., 1st Sess. 334 (1871), *cited in* *Monroe v. Pape*, 365 U.S. 167, 177 (1961).

128. The 1972 amendments to Title VII brought within its reach public school teachers and other employees of local governmental bodies and potentially eliminated suits for discriminatory employment practices brought under 42 U.S.C. §§ 1981 & 1983 (1970).

The Court, moreover, has held in *City of Kenosha v. Bruno*, 93 S. Ct. 2222 (1973), that a city may not be sued under § 1983, because it is not a "person." This holding might conceivably be extended to ban suits under § 1983 against municipal entities such as school boards.

On the other hand, school teacher plaintiffs, for instance, may still sue school board members as individuals; *City of Kenosha* might mean only that damages cannot be

be preserved if a congressional indication that a suit be considered equitable is treated as having the precedential effect of a judge-made rule. As such, it may be a source of analogy, as is a judge-made rule,¹²⁹ for a court seeking to harmonize the application of the Seventh Amendment to actions which are almost identical.¹³⁰

Identity between actions under Title VII and Title VIII and similar actions brought under § 1983¹³¹ may be established, conveniently, by reference to the same three factors which the *Ross* footnote offers as the test of the legal nature of issues: the type of fact questions presented, the remedies asked, and the abilities and limitations of juries. The first factor is obviously the same in both types of actions; the second can be the same if § 1983 plaintiffs limit their claims to the remedies authorized by Congress in Title VII and Title VIII and do not make other claims for relief; and the third is identical since the consideration of jury bias is as relevant to § 1983 plaintiffs as to Title VII and Title VIII plaintiffs.

This analogy is intentionally strict; the policies against judicial in-

won from the public fisc under § 1983. Cf. generally Note, *Vicarious Liability Under Section 1983*, 6 IND. L. REV. 509 (1973). Furthermore, *City of Kenosha* may have no effect on § 1981 actions, since the word "person" does not appear in that statute.

The use of §§ 1981 & 1983 to institute employment discrimination suits is also limited by a line of cases holding that plaintiffs must invoke and exhaust Title VII EEOC proceedings before initiating actions under any other statute. *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970); *Kinsey v. Legg, Mason & Co.*, 6 E.P.D. ¶ 8708 (D.D.C. 1973). But a contrary line holds that the early civil rights actions provide a proper independent cause of action. *Hill v. American Airlines*, 6 E.P.D. ¶ 8703 (5th Cir. 1973); *Young v. Int'l Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971). On the difficulties with EEOC proceedings, see generally Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

Another reason why an action may be brought under §§ 1981 & 1983 but not Title VII is an apparent statute of limitations difference. The old civil rights actions are limited by the analogous state limit for damages claims. See, e.g., *Sitwill v. Burnette*, 5 E.P.D. ¶ 8435 (W.D. Va. 1972) (limit of two years). Title VII putatively carries a tolling period of 180 days. This limitation was extended, however, in *United States v. Georgia Power Co.*, 474 F.2d 906, 922-24 (5th Cir. 1973), to the two-year limit of the old civil rights acts. The court held that the statutory limit applied to single incidents and not on-going practices of discrimination.

129. See p. 415 *supra*.

130. In a case denying the jury trial right as to an action under 42 U.S.C. § 1981 (1970), a district court reached its holding in part because the remedy asked was the same as relief labeled equitable under Title VII. *Williams v. Travenel Laboratories, Inc.*, 4 E.P.D. ¶ 7918 (N.D. Miss. 1972).

131. In the field of employment discrimination, however, there exist some actions which can be brought under § 1983 but which arguably could not be brought under Title VII: *Shields v. Watrel*, 333 F. Supp. 260 (W.D. Pa. 1971); *Calhoun v. Doster*, 324 F. Supp. 736 (M.D. Ala. 1971). These are actions for deprivation of rights not covered in 42 U.S.C. § 2000e-5(g) (Supp. II 1972), which reads in relevant part: "No order of the court [compelling relief shall issue] if such individual was refused admission, suspended, or expelled . . . for any reason other than discrimination on account of faith, color, religion, sex, or national origin or" because he attempted to effectuate this statute.

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vestigations of jury inadequacy argue against broad analogizing from congressional policies of one statute to another merely similar but not in effect identical. The strict analogy limits the applicability of the adequacy principle to the overlap of § 1983 and the modern civil rights actions under Titles VII and VIII.

The principle of congressionally determined inadequacy as the basis for invoking equitable jurisdiction embodied by implication in *Ross* and *Katchen* mandates a reversal of *Rogers v. Loether* and puts the results reached by most courts in Title VII and § 1983 employment discrimination suits on a firmer footing. The principle explains and gives content to the otherwise opaque “abilities and limitations” part of the *Ross* test, and shows that the test is indeed of constitutional stature. Finally, it permits the Court to deal with trial by jury as modern policies dictate, unhampered by classifications frozen for all time in Devonian amber.

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